

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID T. SUMNER, IV,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner of
Social Security,

Defendant.

CASE NO. C04-5387KLS

ORDER AFFIRMING THE
COMMISSIONER'S DECISION
TO DENY BENEFITS

Plaintiff, David T. Sumner, IV, has brought this matter for judicial review of the denial of his applications for disability insurance and supplemental security income ("SSI") benefits. The parties have consented to have this matter be heard by the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Magistrates Rule 13. After reviewing the parties' briefs and the remaining record, the undersigned hereby finds and ORDERS as follows:

FACTUAL AND PROCEDURAL HISTORY

Plaintiff currently is thirty-five years old.¹ Tr. 22. He has a high school education and completed training as a carpenter's apprentice. Tr. 65. He has past work experience as a cook, carpenter, machine operator, and laborer. Tr. 17, 73.

¹Plaintiff's date of birth has been redacted in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 Plaintiff protectively filed applications for disability insurance and SSI benefits on July 25, 2002,
 2 alleging disability as of December 20, 2000, due to pain and other symptoms involving his lower back and
 3 feet. Tr. 12, 48-50, 59, 289-91. Both of his applications were denied initially and on reconsideration. Tr.
 4 22-28, 30-32, 292-301. Plaintiff requested a hearing, which was held on October 29, 2003, before an
 5 administrative law judge ("ALJ"). Tr. 302. At the hearing, plaintiff, represented by counsel, appeared and
 6 testified, as did plaintiff's mother and a vocational expert. Tr. 302-334.

7 On April 15, 2004, the ALJ issued a decision finding plaintiff not disabled. Tr. 18-20. Specifically,
 8 the ALJ found in relevant part as follows:

- 9 (1) at step one of the disability evaluation process, plaintiff had not engaged in
 10 substantial gainful activity since his alleged onset date of disability;
- 11 (2) at step two, plaintiff had "severe" impairments consisting of a lumbar strain with
 12 degenerative changes at L4-5-S1, an adjustment disorder, a pain disorder, and a
 13 personality disorder;
- 14 (3) at step three, none of plaintiff's impairments met or equaled the criteria of any of
 15 those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1;
- 16 (4) at step four, plaintiff had the residual functional capacity to perform a modified
 17 range of medium work, which precluded him from performing his past relevant
 18 work; and
- 19 (5) at step five, plaintiff was capable of performing other work existing in significant
 20 numbers in the national economy.

21 Tr. 19-20. Plaintiff's request for review was denied by the Appeals Council on May 22, 2004, making the
 22 ALJ's decision the Commissioner's final decision. Tr. 4-6; 20 C.F.R. §§ 404.981.

23 On July 6, 2004, plaintiff filed a complaint in this court seeking review of the ALJ's decision. (Dkt.
 24 #1). Plaintiff argues that decision should be reversed and remanded for an award of benefits, because the
 25 ALJ erred in finding he has the residual functional capacity to perform other work existing in significant
 26 numbers in the national economy. Specifically, plaintiff asserts that in so finding the ALJ: (a) improperly
 27 evaluated the medical evidence in the record; (b) erred in assessing plaintiff's credibility; and (c) erred in
 28 assessing the credibility of plaintiff's mother. For the reasons set forth below, however, the undersigned
 finds the ALJ properly determined plaintiff to be not disabled.

DISCUSSION

This court must uphold the Commissioner's determination that plaintiff is not disabled if the
 Commissioner applied the proper legal standard and there is substantial evidence in the record as a whole to

support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v. Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one rational interpretation, the court must uphold the Commissioner's decision. Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984).

I. The ALJ Properly Assessed Plaintiff's Residual Functional Capacity

To determine whether a claimant is entitled to benefits, the ALJ engages in a five-step sequential disability evaluation process. 20 C.F.R. § 416.920. If, at step three of this evaluation process, a disability determination "cannot be made on the basis of medical factors alone," the ALJ then must identify the claimant's "functional limitations and restrictions" and assess his or her "remaining capacities for work-related activities." SSR 96-8p, 1996 WL 374184 *2. A claimant's residual functional capacity assessment is used at step four to determine whether he or she can do his or her past relevant work, and at step five to determine whether he or she can do other work. Id. The claimant's residual functional capacity assessment thus is what he or she "can still do despite his or her limitations." Id.

A claimant's residual functional capacity is the maximum amount of work the claimant is able to perform based on all of the relevant evidence in the record. Id. However, a claimant's inability to work must result from his or her "physical or mental impairment(s)." Id. The ALJ, therefore, must consider only those limitations and restrictions "attributable to medically determinable impairments." Id. In assessing a claimant's residual functional capacity, the ALJ also is required to discuss why the claimant's "symptom-related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the medical or other evidence." Id. at *7.

The ALJ assessed plaintiff with the following residual functional capacity:

[T]he claimant has retained the residual functional capacity to lift and carry 40 pounds on occasion and 25 pounds frequently. He can sit and stand/walk 6 hours each in an 8-hour workday, and occasionally climb ladders, ropes and scaffolds, bend, crouch, kneel, stoop, and crawl.

The claimant's mental impairments cause mild limitations at daily living activities, moderate difficulty with social functioning, concentration, persistence and pace, and no episodes of decompensation. With respect to specific areas of functioning, he can

1 perform simple 1-2-3 step tasks and should have limited interaction with the public.

2 Tr. 17. Plaintiff argues the above residual functional capacity assessment fails to take into account several
3 other mental and physical limitations found by his physicians. To the extent the ALJ failed to include any
4 such limitations, however, that failure was harmless.

5 The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the
6 medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence in the
7 record is not conclusive, “questions of credibility and resolution of conflicts” are solely the functions of the
8 ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, therefore, “the ALJ’s
9 conclusion must be upheld.” Morgan v. Commissioner of the Social Security Administration, 169 F.3d 595,
10 601 (9th Cir. 1999). Determining whether inconsistencies in the medical evidence “are material (or are in
11 fact inconsistencies at all) and whether certain factors are relevant to discount” the opinions of medical
12 experts “falls within this responsibility.” Id. at 603.

13 In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings “must be
14 supported by specific, cogent reasons.” Reddick, 157 F.3d at 725. The ALJ can do this “by setting out a
15 detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation
16 thereof, and making findings.” Id. The ALJ also may draw inferences “logically flowing from the evidence.”
17 Sample, 694 F.2d at 642. Further, the court itself may draw “specific and legitimate inferences from the
18 ALJ’s opinion.” Magallanes v. Bowen, 881 F.2d 747, 755, (9th Cir. 1989).

19 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of
20 either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even when a
21 treating or examining physician’s opinion is contradicted, that opinion “can only be rejected for specific and
22 legitimate reasons that are supported by substantial evidence in the record.” Id. at 830-31. However, the
23 ALJ “need not discuss *all* evidence presented” to him or her. Vincent on Behalf of Vincent v. Heckler, 739
24 F.3d 1393, 1394-95 (9th Cir. 1984) (citation omitted) (emphasis in the original). The ALJ must only explain
25 why “significant probative evidence has been rejected.” Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07
26 (3d Cir. 1981); Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

27 In general, more weight is given to a treating physician’s opinion than to the opinions of those who
28 do not treat the claimant. Lester, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of

1 a treating physician, “if that opinion is brief, conclusory, and inadequately supported by clinical findings.”
 2 Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th
 3 Cir. 2001); Magallanes, 881 F.2d at 75. An examining physician’s opinion is “entitled to greater weight
 4 than the opinion of a nonexamining physician.” Lester, 81 F.3d at 830-31. A nonexamining physician’s
 5 opinion may constitute substantial evidence if “it is consistent with other independent evidence in the
 6 record.” Id. at 830-31; Tonapetyan, 242 F.3d at 1149.

7 A. Dr. Takacs

8 Plaintiff argues the ALJ erred by not adopting all of the work-related functional limitations found by
 9 his treating physician, Dr. John P. Takacs. In his most recent opinion regarding plaintiff’s work-related
 10 functional limitations, dated December 13, 2001, Dr. Takacs stated:

11 Work limits as follows: 40 pounds of lifting, minimize bending and twisting at the waist.
 12 Only occasional squatting and no extensive use of ladders or climbing. Can sit no more
 13 than 45 minutes at a time before being able to get up and move around to stretch. The
 14 recommendation is for a change to new work within these capacities.

15 Tr. 203. With respect to Dr. Takacs opinion, the ALJ found as follows:

16 This report is by a treating source after multiple examinations of the claimant, and it is
 17 given substantial weight. However, the evidence does not show that the claimant needs
 18 to alternate positions every 45 minutes. Dr. [Darrell C.] Brett’s determination of a 2-
 19 hour limit is more reasonable, in light of the claimant’s daily activities and his observed
 20 ability to sit comfortably. The claimant does not need to shift positions more frequently
 21 than can be accommodated by typical work breaks.

22 Tr. 15. Specifically, plaintiff argues that the ALJ improperly rejected Dr. Takacs’ opinion regarding his
 23 need to alternate positions every 45 minutes, and that the ALJ erred by not providing any rationale for
 24 rejecting the limitation that plaintiff minimize twisting at the waist.

25 As noted above, the ALJ did not accept Dr. Takacs’ opinion that plaintiff would need to alternate
 26 positions every 45 minutes, finding the determination of Dr. Brett, a specialist in neurological surgery for
 27 the spine, regarding plaintiff’s ability to alternate positions “more reasonable.” Id. In mid-July 2005, Dr.
 28 Brett examined plaintiff, and recommended in relevant part that he not “be required to sit or stand in a
 stationary position for more than two consecutive hours.” Tr. 187. While Dr. Takacs is plaintiff’s treating
 physician, it is also true that more deference is given to the “opinion of a specialist about medical issues
 related to his or her area of specialty” than to those who are not specialists. Benecke v. Barnhart, 379 F.3d
 587, 594 n.4 (9th Cir. 2004) (citing 20 C.F.R. § 404.1527(d)(5)).

1 Given these conflicting opinions, therefore, it was not unreasonable for the ALJ to find the opinion
2 of Dr. Brett on this issue more persuasive. This is particularly so in light of the other medical evidence in
3 the record. For example, both of the non-examining consulting physicians who assessed plaintiff's residual
4 functional capacity, found him capable of sitting and standing and/or walking about six hours each in an 8-
5 hour day with normal breaks. Tr. 230, 244; Lester, 81 F.3d at 830-31; Tonapetyan, 242 F.3d at 1149 (non-
6 examining physician's opinion may constitute substantial evidence if consistent with other independent
7 evidence in record). No other physician, furthermore, found plaintiff to require any greater restrictions on
8 his ability to sit, stand or walk. Thus, the substantial evidence in the record supports Dr. Brett's opinion
9 more than it does the opinion of Dr. Takacs.

10 Plaintiff also argues, however, that the other reasons provided by the ALJ for rejecting the opinion
11 of Dr. Takacs on this issue are not valid. The undersigned does agree the ALJ did not sufficiently specify
12 the daily activities the ALJ believed contradicted Dr. Takacs' opinion. Tr. 15. However, the ALJ still was
13 correct in rejecting Dr. Takacs' opinion based on the findings of Dr. Brett. While it also is true the ALJ did
14 not specify who he was referring to regarding plaintiff's "observed ability to sit comfortably," Dr. William
15 S.T. Mayhall did note in late November 2001, that he sat "comfortably during the examination." Tr. 15,
16 254. It thus is logical to infer it is Dr. Mayhall's opinion to which the ALJ is referring. See Magellanes, 881
17 F.2d at 755 (court may draw specific and legitimate inferences from ALJ's opinion). Further, although both
18 plaintiff and his mother have reported and testified as to his inability to sit and other pain symptoms, as
19 discussed below, the ALJ properly discounted their credibility.

20 Plaintiff further argues the ALJ erred in not providing any rationale for excluding from his residual
21 functional assessment Dr. Takacs' limitation that he should minimize twisting. Tr. 203. Dr. Harold G. Lee
22 also opined in late September 2002, that plaintiff "probably" could not "tolerate repetitive motion of back
23 for twisting and bending on a consistent basis." Tr. 242. Although no other medical source in the record
24 has so limited plaintiff, and he has been noted to have fairly good range of motion, back flexion/extension
25 and hip rotation on several occasions (Tr. 186, 255, 261, 266-67, 275), the ALJ did not address this issue.
26 Nevertheless, as explained below, such error was harmless.

27 B. Dr. Brett

28 With respect to plaintiff's ability to work, Dr. Brett opined in mid-July 2001, as follows:

1 I feel that he is medically stationary for all intents and purposes with a moderate
2 permanent partial disability in that he should not be required to lift or carry more than 35
3 lbs., perform any repetitive lifting, bending or stooping, or be required to sit or stand in a
stationary position for more than two consecutive hours.

4 Tr. 187. In his decision, the ALJ stated that he gave Dr. Brett's opinion "some weight." Tr. 15. Plaintiff
5 asserts that despite this statement, the ALJ did not include in his residual functional capacity assessment the
6 thirty-five pound weight and repetitive lifting restrictions.

7 Again, it is entirely appropriate for the court to draw "specific and legitimate inferences from the
8 ALJ's opinion." Magallanes, 881 F.2d at 755. Here, it is clear the ALJ evaluated the medical evidence in
9 the record concerning plaintiff's weight limitations, and found Dr. Takacs' forty pound restriction to be
10 more reasonable. Tr. 15. In other words, on this issue, the ALJ considered the opinions of both Dr. Brett
11 and Dr. Takacs, and determined Dr. Takacs's opinion to be more persuasive. Reddick, 157 F.3d at 722
(ALJ is responsible for resolving conflicts in medical evidence).

12 Other medical evidence in the record also supports the ALJ's finding. For example, Dr. Mayhall felt
13 plaintiff could perform at the light to medium level of work (which requires the ability to lift up to fifty
14 pounds). Tr. 258; see 20 C.F.R. §§ 404.1567(c), 416.967(c). Indeed, the two non-examining consulting
15 physicians in the record opined that plaintiff could lift up to fifty pounds. Tr. 230, 244. Although there are
16 other opinions in the record that limited plaintiff to lifting less than thirty-five pounds (Tr. 242, 277, 280), as
17 discussed below, the ALJ properly rejected those greater lifting limitations. Further, Dr. Kevin J. Kane
18 noted there generally was "a consensus that a 40-pound lift limit be placed." Tr. 281. As such, the ALJ did
19 not err in using the forty-pound weight limit.

20 For similar reasons, the ALJ also did not err in declining to include in plaintiff's residual functional
21 capacity assessment Dr. Brett's restriction on repetitive lifting. No other physician in the record, including
22 Dr. Takacs, opined that plaintiff required such a limitation. In addition, as noted above, the weight of the
23 medical evidence in the record shows plaintiff is able to lift up to forty pounds at a time. As the substantial
24 evidence in the record does not indicate plaintiff should be restricted from performing repetitive lifting, the
25 ALJ did not err in rejecting that restriction.

26 C. Dr. Lee

27 In late September 2002, Dr. Lee opined that plaintiff probably was "ready for any sedentary work,"
28 and that he probably could not "tolerate repetitive motion of back for twisting and bending on a constant

1 basis.” Tr. 242. The ALJ again gave Dr. Lee’s opinion “some weight,” but stated that “in light of the mild
2 findings, an assessment of sedentary work is not well supported.” Tr. 15. Plaintiff argues the ALJ did not
3 provide specific or legitimate reasons for rejecting Dr. Lee’s opinion, but instead improperly substituted his
4 own opinion for that of Dr. Lee. The undersigned disagrees.

5 It is not entirely clear whether in stating “in light of the mild findings,” the ALJ was referring to the
6 findings of Dr. Lee or those contained in the record as a whole. In either case, however, the ALJ’s findings
7 are supported by substantial evidence. In the same report in which he limited plaintiff to sedentary work,
8 Dr. Lee noted that plaintiff was in no acute distress, and that he had normal deep tendon reflexes, normal
9 sensation, essentially normal motor strength, negative straight leg raising, and no muscle atrophy. Tr. 241.
10 Further, although plaintiff had some tenderness in his spine, Dr. Lee did “not see any definite clinical
11 evidence of lumbar radiculopathy or myelopathy or other nerve entrapment syndrome.” Tr. 241-42. Dr.
12 Lee continued to report similarly “mild” findings through October 2002. Tr. 235-37.

13 The weight of the other medical evidence in the record also indicates plaintiff’s objective medical
14 findings were generally mild. For example, in early January 2001, Dr. Simon K. Chan found plaintiff to be
15 in no acute distress, with only “mild tenderness” in the lumbar area of his back. Tr. 280. Plaintiff’s deep
16 tendon reflexes and straight leg raising were normal, and he had “[n]o sensory or motor deficit.” Id. In mid-
17 July 2001, Dr. Brett also found plaintiff to be in no acute distress, with no radicular pain or muscle spasm,
18 and “really unimpaired” lumbar range of movement. Tr. 186. He was able to heel and toe walk and
19 repetitively toe stand “without difficulty,” and his strength and sensation were “preserved.” Id. A lumbar
20 spine MRI showed no significant spinal canal compromise or nerve root impingement. Tr. 187. Dr. Brett
21 thus found plaintiff to have “no radicular pain or neurologic deficit.” Id.

22 Dr. Takacs consistently noted plaintiff to have no significant spinal tenderness or symptoms of
23 radiculopathy. Tr. 203, 214, 223-26. In mid-December 2001, Dr. Takacs found plaintiff’s motor sensation
24 and strength to be intact. Tr. 203. In late July 29, 2002, he also found plaintiff to have “moderate thoracic
25 and minimal lumbar somatic dysfunction.” Tr. 200. Similarly, Dr. T. Dorman, who treated plaintiff from
26 late 2001 to late 2002, found that plaintiff had normal back flexion and extension, and that he consistently
27 improved mechanically, symptomatically and anatomically over time. Tr. 261-63, 266-67. For example, in
28 late January 2002, plaintiff was noted to have “[v]irtually no back pain,” and “[n]ormal back mobility,” and

1 in early April 2002, Dr. Dorman found that “[t]here were no objective findings,” and that plaintiff “was not
2 in pain when seen.” Tr. 260-61.

3 In late November 2001, Dr. Mayhall noted that plaintiff’s toe and heel walking were satisfactory,
4 that his “[s]quat to rise” was ninety percent, and that his back flexion and extension were fairly normal. Tr.
5 254. Plaintiff’s motor strength and sensation were intact and hip rotation caused “no pain on either side.”
6 Tr. 255. X-rays of plaintiff’s spine indicated “minimal” findings, and Dr. Mayhall found “no neurologic
7 abnormality on examination.” Tr. 255, 257.

8 While Dr. Gail S. Conway did find plaintiff to have “[d]iminished” lumbar spine extension and side
9 bending with pain in late June 2003. Tr. 275, 277. On the other hand, she also noted that plaintiff had “no
10 tenderness” in his thoracic or lumbar musculature, that he had “excellent non-painful range of motion with
11 flexion at the lumbar spine,” that sensation and motor function in his upper and lower extremities were
12 “completely intact,” and that he had negative straight leg raising. Tr. 275. In addition, Dr. Conway saw “no
13 evidence . . . of neurologic impairment suggesting radiculopathy.” Id.

14 D. Dr. Conway

15 Plaintiff argues the ALJ failed to provide the required rationale for rejecting Dr. Conway’s opinion
16 that he be restricted to sedentary work with bending limitations. Tr. 277. With respect to that opinion, the
17 ALJ stated that “Dr. Conway’s examination showed no significant problems, inconsistent with a finding of
18 sedentary work.” Tr. 16. As discussed immediately above, while Dr. Conway did note plaintiff had pain and
19 limited range of motion with lumbar spine extension and side bending, her findings were otherwise fairly
20 minimal. Tr. 274-75, 277. Therefore, in light of the other mild objective medical findings discussed above,
21 the ALJ did not err in rejecting Dr. Conway’s limitation to sedentary work.

22 Plaintiff is correct that it is insufficient for an ALJ to reject the opinion of a treating or examining
23 physician by merely stating, without more, that there is a lack of objective medical findings in the record to
24 support that opinion. See Embrey v. Bowen, 849 F.2d 418, 421 (9th Cir. 1988). Here, however, the ALJ
25 properly set forth “a detailed and thorough summary of the facts and conflicting clinical evidence” in the
26 record, including the reports of Dr. Conway and the opinions contained therein, stated his interpretation
27 thereof, and made appropriate findings. Tr. 14-17; Reddick, 157 F.3d at 725.

1 E. Dr. Johnson

2 Plaintiff underwent a psychological evaluation performed by Jan G. Johnson, Ph.D. in late December
3 2003. Dr. Johnson found plaintiff had adequate grooming, a normal rate of speech, and clear enunciation.
4 Tr. 284. Plaintiff was oriented and denied having delusions and hallucinations. Tr. 284-85. His affect was
5 angry and he appeared to be dysphoric. Tr. 284. His performance during the evaluation suggested: an
6 adequate fund of knowledge; adequate abilities in attention and concentration; some limitations in abstract
7 thinking; and some weakness in insight and judgment. Tr. 285. While Dr. Johnson assessed plaintiff with a
8 global assessment of functioning (“GAF”) score of 45, he found him to be “of average intelligence with
9 memory and attention/concentration within normal range.” Tr. 287. In terms of plaintiff’s prognosis, Dr.
10 Johnson concluded in relevant part as follows:

11 Mr. Sumner’s ability to return to employment is most likely contingent on the successful
12 management and/or treatment of his medical condition. The medical summary supplied
13 with this referral suggests that there are few medical alternatives at this time and
14 certainly not one that is suitable in Mr. Sumner’s opinion. As long as he continues with
15 this point of view improvement physically or psychologically is doubtful.

16 Tr. 288.

17 With respect to Dr. Johnson’s opinion, the ALJ found as follows:

18 This report is carefully considered, and it documents the claimant’s odd behavior and
19 preoccupation with pain. However, the GAF of 45 is not persuasive – the claimant is
20 noted to have sufficient intelligence, memory, attention and concentration for working.
21 The GAF assessment was based on subjective statements surrounding the claimant’s
22 reports of his physical condition only. Other doctors as reviewed above do not find
23 those limitations. Dr. Johnson’s report is not entirely persuasive.

24 Tr. 16. Plaintiff argues that in addition to the restriction that he have limited interaction with the public, in
25 light of Dr. Johnson’s opinion, the ALJ also should have found he was limited in his ability to: interact with
26 supervisors or coworkers; respond appropriately to and tolerate the pressures and expectations of a normal
27 work setting; and exercise judgment and make decisions.

28 Plaintiff bases his argument on the fact that Dr. Johnson found him to be suspicious and untrusting
of relationships and to have considerable hostility and anxiety, as well as both histrionic and antisocial
personality traits. Tr. 286-87. Nowhere in his report, however, does Dr. Johnson state, or even suggest,
that these psychological traits have resulted in the additional mental functional limitations plaintiff argues
the ALJ should have added to his residual functional capacity assessment. Indeed, were the ALJ to have
done so, he would have improperly substituted his lay opinion for that of Dr. Johnson, a qualified medical

1 professional, which plaintiff previously accused the ALJ doing with respect to Dr. Lee.

2 Plaintiff further argues that in light of Dr. Johnson's opinion the ALJ improperly found plaintiff to be
3 capable of performing "simple 1-2-3 step tasks." Tr. 17. To support this argument, plaintiff asserts he had
4 difficulty in positioning the hands of a clock during the evaluation. During the evaluation, Dr. Johnson had
5 plaintiff draw the hands of a clock. Tr. 285. While plaintiff did not position the hands of the clock at the
6 prescribed time, he correctly draw the circle of a clock face and place the numbers in their prescribed
7 positions. Id. Dr. Johnson, furthermore, noted that plaintiff was able to completed a three-step command
8 "without problems." Id.

9 Lastly, plaintiff argues Dr. Johnson's opinion shows he is unable to sustain even unskilled work,
10 stating the findings of Dr. Johnson establishes that his abilities "are severely limited in crucial areas of the
11 unskilled work abilities." Plaintiff's Reply Brief, p. 8. These basic work abilities include the ability to:
12 understand, remember and carry out simple instructions; respond appropriately to supervisors, co-workers
13 and usual work situations; and deal with changes in a routine work setting. See 20 C.F.R. §§ 404.1521,
14 416.921. Plaintiff, however, does not state what in the opinion or report of Dr. Johnson establishes severe
15 limitations in these abilities. Indeed, the undersigned can find nothing in his opinion or report to support
16 plaintiff's assertion.

17 II. The ALJ Did not Err in Assessing Plaintiff's Credibility

18 Questions of credibility are solely within the control of the ALJ. Sample v. Schweiker, 694 F.2d
19 639, 642 (9th Cir. 1982). The court should not "second-guess" this credibility determination. Allen, 749
20 F.2d at 580. In addition, the court may not reverse a credibility determination where that determination is
21 based on contradictory or ambiguous evidence. Id. at 579. That some of the reasons for discrediting a
22 claimant's testimony should properly be discounted does not render the ALJ's determination invalid, as long
23 as that determination is supported by substantial evidence. Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th
24 Cir. 2001).

25 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent reasons for the
26 disbelief." Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted). The ALJ "must identify
27 what testimony is not credible and what evidence undermines the claimant's complaints." Lester, 81 F.3d at
28 834; Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is

1 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing."
2 Lester, 81 F.2d at 834. The evidence as a whole must support a finding of malingering. O'Donnell v.
3 Barnhart, 318 F.3d 811, 818 (8th Cir. 2003).

4 In determining a claimant's credibility, the ALJ may consider "ordinary techniques of credibility
5 evaluation," such as reputation for lying, prior inconsistent statements concerning symptoms, and other
6 testimony that "appears less than candid." Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996). The ALJ
7 also may consider a claimant's work record and observations of physicians and other third parties regarding
8 the nature, onset, duration, and frequency of symptoms. Id.

9 Plaintiff argues the ALJ's credibility analysis was erroneous because it "consisted of listing factors
10 described in the regulations for evaluating disability," and therefore appeared to be "boilerplate, without any
11 true credibility analysis." Plaintiff's Opening Brief, p. 19 (citing to page 3 of the ALJ's decision, Tr. 14).
12 Plaintiff further asserts the ALJ made only a "blanket assertion" regarding his credibility, by merely stating
13 that he was "not entirely credible in light of information contained in the medical reports and other evidence
14 of record." Id. at p. 20; Tr. 14. This, however, is not an accurate description of what the ALJ actually
15 found regarding plaintiff's credibility.

16 A determination that a claimant's complaints are "inconsistent with clinical observations" can satisfy
17 the clear and convincing requirement. Regennitter v. Commissioner of SSA, 166 F.3d 1294, 1297 (9th Cir.
18 1998). Here, the ALJ found that plaintiff's medical examinations were "not consistent with his purported
19 limitations." Tr. 17. This statement came after a lengthy evaluation of the medical evidence in the record
20 concerning plaintiff's mental and physical impairments. Tr. 14-17. As discussed above, the ALJ did not err
21 in evaluating that evidence, which he properly found indicated much less severe limitations than has been
22 claimed. Thus, the ALJ did not err in discounting plaintiff's credibility for this reason.

23 Failure to assert a good reason for not seeking, or following a prescribed course of, treatment, or a
24 finding that a proffered reason is not believable, "can cast doubt on the sincerity of the claimant's pain
25 testimony." Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989). On the other hand, if the claimant provides
26 evidence of a good reason for not taking medication, his symptom testimony cannot be rejected because he
27 failed to do so. Smolen, 80 F.3d at 1284. Here, the ALJ found as follows:

28 The claimant has declined suggested treatment, saying that he does not want pain
management – he wants his problems to be fixed. Thus, he has in fact declined to

1 cooperate with prescribed treatment.

2 Tr. 17. In addition, the ALJ noted plaintiff “has refused anti-inflammatory medication and has declined
3 most treatment.” Tr. 16.

4 Plaintiff argues he declined anti-inflammatory medication only because it was not effective for his
5 pain, and that the record does not indicate he refused to participate in his plan of treatment. A review of the
6 record indicates otherwise. It is true plaintiff has reported that his prescribed medications, as well as
7 manipulative treatment he has received, has not been effective. Tr. 201, 214, 222-23, 235, 273-75. The
8 record shows, however, that at other times he did receive significant benefits. Tr. 199, 203, 211, 218, 224,
9 260-63, 274, 281. Dr. Takacs, furthermore, stated he did not think plaintiff made all of the manipulative
10 treatment visits that had been scheduled for him. Tr. 220. Dr. Dorman also noted that plaintiff had been
11 “quite negligent” about his prescribed exercises. Tr. 261.

12 There also is substantial evidence in the record to indicate that conservative treatment would have
13 helped plaintiff return to work, but that he just did not believe what his physicians were telling him. Tr. 210,
14 217, 234, 248, 257-59, 261-63, 281-82, 284, 288. Thus, for example, Dr. Mayhall stated that with
15 conservative treatment, such as exercise, strengthening, conditioning, and activity modification, plaintiff
16 could expect to see a “better than 50% improvement” in his back condition.² Tr. 259. Accordingly, the ALJ
17 did not err in discounting plaintiff’s credibility for this reason as well.

18 To determine whether a claimant’s symptom testimony is credible, the ALJ may consider his or her
19 daily activities. Smolen, 80 F.3d at 1284. Such testimony may be rejected if the claimant “is able to spend a
20 substantial part of his or her day performing household chores or other activities that are transferable to a
21 work setting.” Id. at 1284 n.7. The claimant need not be “utterly incapacitated” to be eligible for disability
22 benefits, and “many home activities may not be easily transferable to a work environment.” Id. The ALJ
23 discounted plaintiff’s credibility in part because of his activities of daily living, finding that:

24
25 ²Plaintiff cites to Byrnes v. Shalala, 60 F.3d 639, 641 (9th Cir. 1995) for the proposition that the ALJ “must ‘examine
26 the medical conditions and personal factors that bear on whether [a claimant] can reasonably remedy’ his impairment.” (citations
27 omitted). What the Ninth Circuit actually stated in that decision, however, was that the ALJ must do so “before basing a denial
28 of benefits on noncompliance.” Id. (emphasis added). Here, the ALJ did not base his denial of benefits on plaintiff’s
noncompliance, but rather properly used that noncompliance as evidence of plaintiff’s lack of credibility. Byrnes also is factually
distinguishable from this case. In Byrnes, the ALJ “made no finding” that the claimant was noncompliant with his treatment
program or that he “lacked good cause for failing so to comply.” Id. (citations omitted). Here, again, the ALJ did make such
findings.

1 The claimant told Dr. Mayhall that he went shopping, played his keyboard, did exercises,
2 and walked his dog. He apparently is involved in composing music. He has reported
3 that he does some household chores. He indicated that he did not go shopping, but this
4 was due to a lack of money, not because of his impairments.

5 Tr. 16. Plaintiff argues there is no indication in the record that these activities consumed a substantial part
6 of his day or that they are easily transferable to a work environment. The undersigned agrees. See Tr. 81-
7 88, 224-25, 240, 254, 284. Nevertheless, the mere fact that one of the ALJ's reasons is not legitimate, does
8 not render the credibility determination invalid, as long as it is supported by the substantial evidence, as it is
9 here. Tonapetyan, 242 F.3d at 1148.

10 III. The ALJ Properly Assessed the Testimony of Plaintiff's Mother

11 Lay testimony regarding a claimant's symptoms "is competent evidence that an ALJ must take into
12 account," unless the ALJ "expressly determines to disregard such testimony and gives reasons germane to
13 each witness for doing so." Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001). Plaintiff argues the ALJ failed
14 to give germane reasons for discrediting the testimony of his mother. With respect to that testimony, the
15 ALJ found as follows:

16 The claimant's mother, Sharon Sumner, testified that the claimant was concerned about
17 his back. She stated that he did nothing around the house and stayed in bed most of the
18 time. However, he went to the library from time to time. Prior to the accident, he had
19 been very active and he had gotten much worse over the prior two years. She said that
20 the claimant could not go to the opera anymore because he could not sit very long. He
21 had expressed some anger, thinking that his doctors had not been able to help. Her
22 testimony is considered credible to the extent that it is consistent with the claimant's
23 medical reports reviewed above.

24 Tr. 17. Plaintiff asserts the ALJ gave no specificity as to which testimony he found credible and which he
25 found not credible, and did not detail with respect to what medical evidence the testimony of plaintiff's
26 mother was inconsistent.

27 In rejecting lay testimony, however, the ALJ need not cite the specific record as long as "arguably
28 germane reasons" for dismissing the testimony are noted, even though the ALJ does "not clearly link his
determination to those reasons," and substantial evidence supports the ALJ's decision. Lewis, 236 F.3d at
512. The ALJ also may "draw inferences logically flowing from the evidence." Sample, 694 F.2d at 642.
As discussed above, the ALJ gave a detailed evaluation of the medical evidence in the record, and properly
found it to be inconsistent with plaintiff's claims of disabling limitations. Lewis, 236 F.2d at 511; Vincent on
Behalf of Vincent v. Heckler, 739 F.3d 1393, 1395 (9th Cir. 1984) (ALJ may discount lay testimony if it

conflicts with medical evidence). Accordingly, the ALJ did not err in finding the testimony of plaintiff's mother to be credible only to the extent that it is consistent with that evidence.

IV. The ALJ Properly Found Plaintiff Not Disabled at Step Five of the Disability Evaluation Process

If a claimant cannot perform his or her past relevant work, at step five of the disability evaluation process the ALJ must show there are a significant number of jobs in the national economy the claimant is able to do. Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. §§ 404.1520(d)-(e), 416.920(d)-(e). The ALJ can do this through the testimony of a vocational expert or by reference to the Commissioner's Medical-Vocational Guidelines (the "Grids"). Tackett, 180 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

An ALJ's findings will be upheld if the weight of the medical evidence supports the hypothetical posed by the ALJ. Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987); Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony therefore must be reliable in light of the medical evidence to qualify as substantial evidence. Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the claimant's disability "must be accurate, detailed, and supported by the medical record." Embrey, 849 F.2d at 422 (citations omitted). The ALJ, however, may omit from that description those limitations he finds do not exist. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (because ALJ included all limitations that he found to exist, and those findings were supported by substantial evidence, ALJ did not err in omitting other limitations claimant failed to prove).

The ALJ posed the following hypothetical question to the vocational expert:

Assume for this hypothetical, that this individual could lift or carry 40 pounds occasionally, 25 pounds frequent[ly]. Would be able to stand 6 of 8 hours or sit 6 of 8 hours. Should only occasionally be required to use ladders, ropes, scaffolds, or to stoop, crouch, or crawl. Would be limited to simple one, two, three step work, because of the distractions of pain and medication possibly. And should have limited interaction with the public.

Tr. 330. Based on this hypothetical question, the vocational expert testified that plaintiff could perform the jobs of small parts assembler, routing clerk and electronics assembler. Id. The ALJ adopted the vocational expert's testimony regarding the jobs plaintiff could perform. Tr. 18-19.

Plaintiff argues the hypothetical question the ALJ posed to the vocational expert was incomplete, because it did not include the limitations of occasional bending and kneeling. While the undersigned finds that it was error not to include these limitations in the hypothetical question, given the fact that the ALJ had

1 included them in his assessment of plaintiff's residual functional capacity, that error was harmless. See
2 Batson v. Commissioner of the Social Security Administration, 359 F.3d 1190, 1197 (9th Cir. 2004)
3 (applying harmless error standard); Curry v. Sullivan, 925 F.2d 1127, 1131 (9th Cir. 1990) (holding ALJ
4 committed harmless error).

5 Each of the jobs described by the vocational expert are defined in the Dictionary of Occupational
6 Titles ("DOT"). See DICT # 706.684-022 (Assembler, Small Products I), # 222.687-022 (Routing Clerk),
7 # 726.261-010 (Electronics Assembler, Developmental), attached to Plaintiff's Reply Brief as Exhibits "A,"
8 "B" and "C." The DOT describes the physical demands required by each of these jobs. Id. In terms of
9 postural limitations, the DOT lists climbing, balancing, stooping, kneeling, crouching, and crawling. Id. For
10 each of these activities, the DOT states "Not Present - Activity or condition does not exist." Id. Thus,
11 kneeling, whether occasional or frequent, is not required for any of the three jobs.

12 In addition, while it is true the DOT's descriptions of those jobs do not refer to bending, it seems
13 clear that the ability to engage in various postural activities is not a factor in determining the ability to
14 perform the work required. As such, the ALJ's error in excluding the limitation to occasional bending from
15 the hypothetical question posed to the vocational expert was harmless. Similarly, while, as discussed above,
16 the ALJ failed to properly address Dr. Takacs' opinion that plaintiff minimize "twisting at the waist," there
17 is no indication that the ability to twist is required to perform the above jobs any more than any other of the
18 postural activities defined by the DOT as being "Not Present." Accordingly, the ALJ's determination that
19 plaintiff could perform these jobs was proper.

20 CONCLUSION

21 Based on the foregoing discussion, the court finds the ALJ properly determined plaintiff was not
22 disabled. Accordingly, the ALJ's decision is affirmed.

23 DATED this 2nd day of August, 2005.

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25
26 

27 Karen L. Strombom
28 United States Magistrate Judge